(2)

No. 87-2071

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID RODRIGUEZ DIAZ, *et al.*,

Petitioners,

v.

MEXICANA DE AVION, S.A., and
BOEING COMMERCIAL AIRPLANE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT COMPANIA MEXICANA DE AVIACION, S.A. DE C.V.

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Question Presented

Whether the District Court abused its broad range of discretion in conditionally dismissing the Complaint on *forum non conveniens* grounds and concluding that Mexico was an adequate and available alternative forum for the trial of this action arising from an air crash in Mexico?

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Opinions Below

The opinion of the District Court on petitioners' motion for reconsideration, which disposed of petitioners' argument that Mexico is not a suitable alternative forum, was omitted by the petitioners from their petition for a writ of certiorari. It is reprinted as an Appendix to this brief in opposition commencing at page A-26.

Statement of the Case

This is an action to recover wrongful death damages arising from an air crash disaster in Mexico on March 31, 1986. The original petitioners, representatives of sixteen Mexican citizens killed in the crash of a Mexicana flight

from Mexico City, Mexico to Puerto Vallarta, Mexico, commenced this wrongful death action against respondents Compania Mexicana de Aviacion, S.A. de C.V. a/k/a Mexicana Airlines (sued herein as Mexicana de Avion, S.A. and hereinafter Mexicana[1]) and the Boeing Airplane Company (hereinafter Boeing) in the District Court of Bexar County, Texas. (A-1; A-14). Mexicana timely removed the action to the United States District Court for the Western District of Texas based upon the provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602 *et seq.* Petitioners then moved to file an Amended Complaint naming a United States citizen as an additional plaintiff. (A-2; A-7).

Boeing moved to dismiss the Complaint on the ground of *forum non conveniens* and for failure to state a claim upon which relief can be granted. (A-2). On January 23, 1987, the District Court, H.F. Garcia, U.S.D.J., granted Boeing's motion to dismiss the Complaint on *forum non conveniens* grounds as to both respondents. (A-1).

Petitioners then moved for reconsideration of the District Court's Order dismissing the Complaint. After further briefing and oral argument, the District Court denied the motion for reconsideration on April 17, 1987, finding that Mexico was both an available and an adequate forum. (A-26).

Petitioners then appealed to the United States Court of Appeals for the Fifth Circuit. In stressing the trial court's discretion in deciding *forum non conveniens* motions, the Fifth Circuit found that the District Court had correctly applied the "private interest" and "public interest" factors of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and properly concluded that Mexico was the ap-

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[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Mexicana states that it has the following subsidiaries:

AT, S.A. de C.V.
Transportacion Aerea Mexicana, S.A.
Datatronic, S.A. de C.V.

propriate forum for this action. (A-13 - A-20). Following affirmance of the District Court by the Fifth Circuit Court of Appeals, petitioners timely filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

I

No Significant Issue Is Presented for Review by the Certiorari Petition.

The issue presented by this petition is whether the District Court abused its discretion when, after weighing all the "private interest" and "public interest" factors of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947), it concluded that Mexico was an adequate and available alternative forum for the trial of claims arising from this air crash disaster involving an aircraft owned by a Mexican airline which crashed while on a flight between two cities in Mexico.

In the *forum non conveniens* determination, each case turns on its own facts and the District Courts are accorded substantial flexibility in evaluating a *forum non conveniens* motion. *Van Cauwenberghe* v. *Biard,* 56 U.S.L.W. 4548 (U.S. June 13, 1988) (No. 87-336). Where the District Court has considered all the relevant "private interest" and "public interest" factors, and where its balancing of these factors is reasonable, the decision of the trial court deserves substantial deference. *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 257 (1981).

The original opinion of the District Court (A-1 - A-11) and its opinion on the petitioners' motion for reconsideration (A-26), as affirmed by the Fifth Circuit, (A-13 - A-20), demonstrates that the District Court weighed all the *Gilbert* factors in reaching its conclusion that Mexico was the appropriate forum. Nothing in the opinion of the

District Court leads to the conclusion that there was an abuse of discretion by the District Court in conditionally dismissing this case to Mexico.

II

The Decision of the Court Below Is Consistent With Substantial Authority in Other Circuit Courts.

A. *The Presence of American Plaintiffs Does Not Warrant the Retention of Jurisdiction.*

Petitioners' principal argument is that the District Court should have retained jurisdiction over this action since there is an American citizen plaintiff. (Petition for Certiorari, p. 5). As the Fifth Circuit noted, however:

> . . . . the presence of a United States citizen as a plaintiff is not dispositive. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 255 n.23 (1981). The district court must, and did, weigh all the factors, giving somewhat more weight to a citizen's or resident's choice of forum than to that of a foreign plaintiff. Here, the United States citizens were far outnumbered in the class by Mexican nationals. Furthermore, they constituted one family who had moved to the United States from Mexico, and still maintained strong ties there. They were spending an extended period of time in Mexico and had bought their tickets for this internal Mexican flight in Mexico. Furthermore, their representatives were added as plaintiffs after the choice of forum had been made. Thus, we do not find that their presence in this lawsuit outweighs the district court's careful consideration of *all* the public and private interests at stake.

(A-17).

This determination is in accord with numerous other cases which, citing *Reyno*, have held that other countries

are proper alternative forums, notwithstanding the presence of a United States citizen as plaintiff. *See, e.g., Kryvicky* v. *Scandinavian Airlines System*, 807 F.2d 514 (6th Cir. 1986); *Pacific Employers Insurance Co.* v. *M/V Capt. W.D. Cargill*, 751 F.2d 801 (5th Cir.), *cert. denied*, 474 U.S. 909 (1985); *Diatronics* v. *Elbit Computers, Ltd.*, 649 F. Supp. 122 (S.D.N.Y. 1986), *aff'd*, 812 F.2d 712 (2d Cir. 1987); *Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *Nai-Chao* v. *Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982), *aff'd sub nom. Cheng* v. *Boeing Co.*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983).

Petitioners' reliance on *Schexnider* v. *McDermott International, Inc.*, 817 F.2d 1159 (5th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 488 (1987) for the proposition that the District Court did not give proper deference to the United States citizenship of one of the plaintiffs is misplaced. In *Schexnider*, the Court held that the district court abused its discretion in dismissing the suit on *forum non conveniens* grounds because "the private and public interest factors" did not clearly establish that Australia was a suitable alternative forum. *Schexnider*, 817 F.2d at 1163. Specifically, the Court held that the appellees did not establish that a trial in Louisiana would be of great inconvenience:

> From the record, we observe that the appellees were apparently ready and able to have their case tried in Lake Charles [Louisiana]. At least in a few instances, the trial date in this case was reset on Schexnider's motion, not the appellees'.

Schexnider, 817 F.2d at 1163. The Court relied on the fact that extensive pretrial proceedings had taken place in the case over a five year period in concluding that the public interest factors also pointed to the United States as the convenient forum. *Id.*

None of the factors compelling reversal in *Schexnider* are present in this case. The *Schexnider* decision was based on the advanced stage of the litigation at the time the *forum non conveniens* motion was made. There were no extensive pretrial proceedings in this matter and both respondents promptly moved for dismissal in the District Court. (A-1; A-2).

B. *The Presence of Some Evidence in the United States Does Not Warrant Retention of Jurisdiction.*

The District Court correctly concluded that the majority of the sources of proof on both liability and damage issues are more readily available in Mexico than in the United States. (A-7; A-9; A-16). Even when relevant evidence is located in the United States, dismissal is appropriate if a larger proportion of relevant evidence is located in the foreign jurisdiction. *See, e.g., Piper Aircraft Co.* v. *Reyno,* 454 U.S. at 257-258.

In this case, relevant evidence concerning potential liability is located predominantly in Mexico. Among the significant sources of proof located in Mexico is the work product of the Mexican accident investigation, including the records of the accident aircraft; statements of eyewitnesses and air traffic controllers; the wreckage and other physical evidence from the crash site; results of tests performed on aircraft components; and the records relating to communications between the Mexicana flight crew and air traffic controllers. (A-7; A-8). Additionally, since most petitioners are Mexican citizens, evidence and witnesses concerning damage issues would also be located in Mexico. (A-9).

The fact that evidence concerning the design and manufacture of the aircraft is located in the United States does not support petitioners' argument that the District Court abused its discretion in conditionally dismissing the action. *See Jennings* v. *Boeing Co.,* 660 F. Supp. 796 (E.D. Pa.

1987), *reh'g granted,* 677 F. Supp. 803 (E.D. Pa. 1987), *aff'd,* 838 F.2d 1206 (3d Cir. 1988); *Nai-Chao* v. *Boeing Co.,* 555 F. Supp. 9 (N.D. Cal. 1982), *aff'd sub nom. Cheng* v. *Boeing Co.,* 708 F.2d 1406 (9th Cir.), *cert. denied,* 464 U.S. 1017 (1983); *Rubinstein* v. *Piper Aircraft Corp.,* 587 F. Supp. 460 (S.D. Fla. 1984). In *Nai-Chao* v. *Boeing, supra,* the court relied on the fact that the majority of the evidence was located in Taiwan, where the crash occurred and dismissed the Complaint even though evidence relating to design and manufacture of the aircraft was located in the United States. *Nai-Chao* v. *Boeing Co.,* 555 F. Supp. at 17-18.

C. *Mexico Is Both an Available and an Adequate Alternate Forum.*

Petitioners omit from their Appendix the Order of the District Court dated April 17, 1987 (A-26) which disposes of petitioners' argument that Mexico is not both an adequate and an available forum.

> Plaintiffs also argue that a remedy in a Mexican forum would not be adequate. Prior to filing their motion for reconsideration, plaintiffs did not contend that Mexican law would make a Mexican forum inadequate. They now claim that litigation in Mexico would last 4 to 6 years because the Mexican government owns the majority of the shares of Mexicana, that there is no cause of action in Mexico against Boeing, and that the recovery against Mexicana is severely limited. The affidavit of Javier Quijano Baz, a lawyer and the president of the Mexican Bar Association, refutes these contentions. He concludes that litigation of this case in Mexico would last 2 to 3 years, an optimistic length of time were the case to remain here. He also testifies that plaintiffs have causes of action against Boeing and Mexicana in Mexico for negligence and strict liability, respectively. Against Boeing, plaintiffs can recover moral damages and economic losses. The

> monetary recovery against Mexicana though less than that available in the United States, is not inadequate. If plaintiffs prove reckless and wanton conduct, it is unlimited. The fact that damages may be limited and that there is no strict liability cause of action against Boeing does not make a remedy in Mexico inadequate. *Piper Aircraft Company* v. *Reyno,* 454 U.S. 235, 254-255, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981). Plaintiffs' fear that a judgment would not be collectible is without merit. Both defendants are insured and have agreed to satisfy any judgment rendered in a Mexican Court. This Court remains convinced that an adequate and available alternative forum exists. The Court has considered all of plaintiffs' arguments and finds them to be without merit.

(A-26; A-27).

The existence of an available and adequate alternative forum is a threshold prerequisite for application of the *forum non conveniens* doctrine. *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 254 n.22 (1981); *In re Air Crash Disaster Near New Orleans, La.,* 821 F.2d 1147, 1164 (5th Cir.), *petition for cert. filed sub nom. Pan American World Airways, Inc.* v. *Lopez,* 56 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750). A foreign country forum is available when the entire case and all parties can come within the jurisdiction of that forum. *In re Air Crash Disaster Near New Orleans, La.,* 821 F.2d at 1165. The foreign country forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they might not enjoy the same benefits as they receive in an American court. *In re Air Crash Disaster Near New Orleans, La.,* 821 F.2d at 1165.

The District Court considered the evidence and correctly determined that Mexicana and Boeing would be amenable to jurisdiction in Mexico. (A-3; A-10; A-11). The District Court eliminated the possibility that the foreign forum would be unavailable by expressly conditioning dismissal

on Mexicana and Boeing agreeing to 1) accept process and submit to Mexican jurisdiction; 2) waive any statute of limitations defense matured since the commencement of this action; 3) make available all witnesses and documents in the Mexican proceeding; and 4) satisfy any final judgment entered by the Mexican courts. (A-10; A-11). Such conditions are those customarily employed by the Courts in granting a *forum non conveniens* dismissal, *see e.g. Gonzalez* v. *Naveira Neptuno, A.A.*, 832 F.2d 876 (5th Cir. 1987); *Lacey* v. *Cessna Aircraft Co.*, 674 F. Supp. 10 (W.D. Pa. 1987) and use of such a conditional order of dismissal eliminates any question about the amenability of Mexicana and Boeing to suit in Mexico. *See Veba-Chemie A.G.* v. *M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983). Under a *forum non conveniens* analysis, "it is relevant only that the alternative forum be available at the time of dismissal so that plaintiff may pursue his action in what has been determined to be a substantially more convenient forum." *Veba-Chemie A.G.* v. *M/V Getafix*, 711 F.2d at 1248.

Syndicate 420 at Lloyd's London v. *Early American Insurance Co.*, 796 F.2d 821 (5th Cir. 1986), cited by petitioners, is inapposite. In *Syndicate 420*, the court, while affirming the rule of *Veba-Chemie*, went one step further and modified the District Court's order of dismissal to further condition dismissal on the foreign court's willingness to permit parties other than *Syndicate 420* to intervene in the London action. *Syndicate 420*, 796 F.2d at 830.

Boeing's consent to the jurisdiction of the Mexican courts satisfies the requirement that an alternative forum be available. *Coakes* v. *Arabian American Oil Co.*, 831 F.2d 572 (5th Cir. 1987); *Veba-Chemie A.G.* v. *M/V Getafix*, 711 F.2d at 1249. As the Court stated in *Vaz Borralho* v. *Keydril Co.*, 696 F.2d 379 (5th Cir. 1983):

> A defendant's agreement to submit to the jurisdiction of the foreign forum, along with a conditional dismissal, "obviates the need for extensive inquiry into

> foreign jurisdictional law since, if the foreign court refuses to take jurisdiction, 'plaintiff is still protected by the conditional nature of the dismissal.'" *Calavo Growers of Cal.* v. *Belgium*, 632 F.2d 963, 968 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084, 101 S.Ct. 871, 66 L.Ed.2d 809 (1981). This is implicit in *Chiazor*, 648 F.2d at 1020. To the same effect is *In Re Disaster at Riyadh Airport Saudi Arabia*, 540 F. Supp. 1141, 1145 (D.D.C. 1982).

Vaz Borralho v. *Keydril Co.*, 696 F.2d at 392 n.12.

Petitioners argue that the codified nature of Mexican damage law means that they will recover less money in Mexico than they would if the case were tried in the United States, assuming that United States damage law would be applicable. A remedy is not considered inadequate merely because the monetary damages awarded in the alternative forum may be smaller. *See Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 255; *Ahmed* v. *Boeing Co.*, 720 F.2d 224, 226 (1st Cir. 1983); *In re Disaster at Riyadh Airport, Saudi Arabia on August 19, 1980*, 540 F. Supp. 1141, 1145 (D.D.C. 1982). The District Court considered the evidence submitted by the parties and concluded that the Mexican remedies were adequate. (A-26; A-27).

The possibility of an unfavorable change in law does not mandate retaining jurisdiction. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 250; *Syndicate 420 at Lloyd's London* v. *Early American Insurance Co.*, 796 F.2d 821, 829 (5th Cir. 1986). In *Reyno* the Court recognized that there may be circumstances in which the remedy afforded by the foreign jurisdiction would be so clearly inadequate or unsatisfactory "that dismissal would not be in the interest of justice". *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 254. Those circumstances, however, do not arise unless a party "will be deprived of any remedy or [will be] treated unfairly." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 255. Clearly, those circumstances do not exist here.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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Certificate of Service

I hereby certify that I have this 14th day of July, 1988 served three copies of the foregoing Brief in Opposition of respondent Compania Mexicana De Aviacion, S.A. De C.V. to the Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit upon petitioners by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage pre-paid to:

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APPENDIX

APPENDIX

Order of United States District Court
(Filed April 17, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
SA-86-CA-1065

DAVID RODRIGUEZ DIAZ, *et al.*,
Plaintiffs,

VS.

MEXICANA DE AVION, S.A., and
BOEING COMMERCIAL AIRPLANE COMPANY,
Defendants.

ORDER

On the 10th day of April, 1987, came on to be heard plaintiffs' motion for reconsideration of this Court's Order of January 23, 1987 dismissing this cause of action based upon forum non conveniens. After consideration of the argument of counsel and the respective briefs of the parties, the Court remains convinced that dismissal was appropriate.

Plaintiffs complain that they were deprived of discovery on the forum non conveniens issue prior to entry of the Order. The record reveals that the motion to dismiss was filed November 12, 1986. Shortly thereafter, plaintiffs requested leave to submit in excess of twenty interrogatories to defendants but did not assert the pending motion

as a basis for the additional discovery. On December 5th, Boeing filed a motion to stay discovery. The motion sought a restraint of discovery as to plaintiffs' substantive claims but not as to the forum non conveniens issue. In fact, counsel for Boeing offered to arrange for the deposition of a witness on this issue. Plaintiffs' memorandum in opposition to Boeing's motion to dismiss, filed almost two months after the motion and well beyond the ten day limit set in the Local Rules, made no mention of the need for discovery. Plaintiffs have never moved to compel the answers to any interrogatories or the production of any documents related to the forum non conveniens issue. Their complaint regarding the denial of discovery is without merit.

Plaintiffs also argue that a remedy in a Mexican forum would not be adequate. Prior to filing their motion for reconsideration, plaintiffs did not contend that Mexican law would make a Mexican forum inadequate. They now claim that litigation in Mexico would last 4 to 6 years because the Mexican government owns the majority of the shares of Mexicana, that there is no cause of action in Mexico against Boeing, and that the recovery against Mexicana is severely limited. The affidavit of Javier Quijano Baz, a lawyer and the president of the Mexican Bar Association, refutes these contentions. He concludes that litigation of this case in Mexico would last 2 to 3 years, an optimistic length of time were the case to remain here. He also testifies that plaintiffs have causes of action against Boeing and Mexicana in Mexico for negligence and strict liability, respectively. Against Boeing, plaintiffs can recover moral damages and economic losses. The monetary recovery against Mexicana though less than that available in the United States, is not inadequate. If plaintiffs prove reckless and wanton conduct, it is unlimited. The fact that damages may be limited and

that there is no strict liability cause of action against Boeing does not make a remedy in Mexico inadequate. *Piper Aircraft Company* v. *Reyno*, 454 U.S. 235, 254-255, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981). Plaintiffs' fear that a judgment would not be collectible is without merit. Both defendants are insured and have agreed to satisfy any judgment rendered in a Mexican Court. This Court remains convinced that an adequate and available alternative forum exists. The Court has considered all of plaintiffs' arguments and finds them to be without merit.

It is, therefore, ORDERED that plaintiffs' motion for reconsideration is DENIED.

SIGNED this 17th day of April, 1987.

/s/ H.F. GARCIA
H.F. GARCIA
United States District Judge